No. 89-1563

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In The

Supreme Court of the United States

October Term, 1989

HANK WILLIAMS, JR., BILLIE JEAN WILLIAMS BERLIN, CHAPPELL MUSIC COMPANY, a Division of CHAPPELL & CO., INC., ABERBACH ENTERPRISES, LTD., ACUFF-ROSE-OPRYLAND MUSIC, INC., MILENE-OPRYLAND MUSIC, INC., WESLEY H. ROSE and ROY ACUFF, Individually and as Trustees in Liquidation for Stockholders of Fred Rose Music, Inc. and Milene Music, Inc., FRED ROSE MUSIC, INC., and MILENE MUSIC, INC.,

Petitioners,

vs.

CATHY YVONNE STONE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS HAD THE INHERENT POWER TO RECALL ITS MANDATE, GRANT A SECOND PETITION FOR REHEARING AND RECONSIDER ITS EARLIER CONCLUSION REGARDING PETITIONERS' CLAIMED PREJUDICE IN VIEW OF THE UNDISPUTED EVIDENCE IN THE RECORD ON APPEAL THAT PETITIONERS KNEW ABOUT RESPONDENT AND HER CONTINGENT RENEWAL INTEREST LONG BEFORE RESPONDENT DID.

2. WHETHER THE FILING AND/OR DENIAL OF A PETITION FOR WRIT OF CERTIORARI DIVESTS A COURT OF APPEALS OF ITS INHERENT POWER TO RECALL THE MANDATE AND GRANT A SECOND PETITION FOR REHEARING.

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IV. STATEMENT OF THE CASE[1]

A. Statement Of Facts.

Respondent's natural mother, Bobbie W. Jett ("Jett"), and Hank Williams, Sr. executed a custody and support agreement on October 15, 1952. That agreement describes Williams, Sr. as Respondent's father three times. Respondent was to be cared for by Williams, Sr.'s mother, Mrs. Lillian Stone ("Mrs. Stone"), until she turned three. Williams, Sr. was to have custody of the child for the next three years, after which he and Jett were to have joint custody. The agreement's operative provisions are quoted in App. H at H-1.5-1.7.[2]

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1 Only those facts pertinent to whether certiorari should issue which are not in Petitioners' Statement of the Case are set forth herein. A more comprehensive statement of facts is contained in Respondent's Petition for Writ of Certiorari in Stone vs. Williams, Jr., et al., No. 89-295.

2 References to "App." are to the Appendices to the Petition for Writ of Certiorari.

Mrs. Stone told the Alabama adoption agency that her son was Respondent's father (App. H at H-1.14-1.15). The contemporaneous adoption records, sealed under state law, state that Williams, Sr. is Respondent's father (Id.). Mrs. Stone (and her husband) adopted and cared for Respondent until Mrs. Stone died in 1955.

When Irene Smith, Williams, Sr.'s sister (and thus Respondent's aunt), reneged on her promise to care for Respondent if Mrs. Stone could not, Respondent was made a ward of the state (App. B at B-1.4). Smith also acknowledged that her brother was Respondent's father (App. H at H-1.17-1.20). Respondent lived in a foster home until she was placed with, and in 1959 adopted by, George and Mary Deupree (App. B at B-1.4).

In 1960 or 1961 Smith was the Alabama guardian of Williams, Jr. In that capacity she was represented by Robert Stewart, Williams, Sr.'s attorney ("Stewart"). Petitioner Fred Rose Music, Inc. ("Fred Rose Music") began negotiating with Stewart to acquire Williams, Jr.'s contingent renewal copyright interest in the Williams, Sr. compositions. Fred Rose Music learned about Respondent and her potential claim to the Williams, Sr. estate and the renewal copyrights from Stewart during these negotiations. They jointly considered how Respondent's rights could be cut off (App. H at H-1.21-1.26). Rather than settle the issue of Respondent's rights, Fred Rose Music embarked upon a course of conduct with Stewart and Smith to conceal those rights from Respondent and the world.

By a March 20, 1963, agreement with Smith (as Williams Jr.'s guardian), Fred Rose Music was assigned his contingent renewal copyright interest. Although all parties to the assignment knew of Respondent and her contingent interest, she is not included in the agreement's list of people warranted to be the only other "children" or "next of kin".[3] Stewart filed an action in the Alabama state court to obtain approval of the assignment. Respondent's existence and relationship to Williams, Sr. was not disclosed.

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3 Aware that the assignment from Williams, Jr. had value only if he was alive when the renewal copyrights came into existence, Miller Music Corp. v. Charles N. Daniels, Inc., 362 U.S. 373, 377-78 (1960), Fred Rose Music also purchased Smith's contingent interest as Williams, Sr.'s next of kin for $5,000, obtained an assignment from Smith's son of his contingent interest for no additional payment, purchased the contingent interest belonging to Williams, Sr.'s half-sister for $2,000, and that of his father for $1,500.

Several years later, the assignment was challenged by Audrey Mae Williams, Williams, Sr.'s first wife and Williams, Jr.'s mother. To defend the fairness of the 1963 assignment, Smith advised the Alabama court for the first time that there might be others possessed of an interest in the renewal copyrights (App. H at H-1.31-1.32). Drayton Hamilton was appointed guardian ad litem for any unknown potential heirs.[4]

Upon learning of the circumstances of Respondent's birth and over the objection of her adoptive parents, Hamilton argued that Respondent was an heir of Williams, Sr. Williams, Jr.

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4 Hamilton had acted as Respondent's guardian ad litem in the probate of Mrs. Stone's will, at which time he knew only that she had been adopted by Mrs. Stone. Smith, the sole beneficiary under that will, successfully defeated Hamilton's attempt to have Respondent, her niece, deemed to be a pretermitted heir of Mrs. Stone's. Hamilton v. Smith, 86 So.2d 283 (Ala. 1956).

objected to the court adjudicating Respondent's interest in the renewal copyrights because they were not part of Williams, Sr.'s estate, but Fred Rose Music insisted that the issue be determined so that a favorable ruling might be raised to bar any claim she might later assert. The state court ruled that Williams, Jr. was the only heir because Respondent had not been legitimated in the manner then required by Alabama law and had been adopted twice after Williams, Sr.'s death.

Stewart replaced Smith as administrator of the Williams, Sr. estate after she was convicted of cocaine smuggling in 1969. Even though the Alabama court had ruled Respondent was not an heir, Stewart began setting aside a portion of the estate income in case the issue was revisited (App. H at H-1.26). He did so

until the estate was closed in 1975.[5]

Respondent was entitled to receive approximately $3,800 from Mrs. Stone's homestead allowance when she turned 21. Respondent claimed that inheritance in 1974. When Stewart learned of this, he advised counsel for Williams, Jr. that "trouble might ensue" (App. H at H-1.26). Rather than confront the situation when percipient witnesses were alive and evidence of Respondent's paternity was readily available, Williams, Jr. and the Acuff/Rose Petitioners did nothing.

Though not parties to the 1967-1968 proceedings, the Berlin/Aberbach Peti-

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5 Respondent submits that Stewart did this for two reasons. First, under Alabama law, Respondent could challenge the 1967-1968 orders until January 1976, two years after she turned 21 (App. H at H-1.35). Second, the then proposed amendments to the 1909 Copyright Act, 17 U.S.C. §1, et seq. (1976 ed.), provided that illegitimates were children for purposes of §24 and, if enacted, would have confirmed Respondent's rights in the renewals.

tioners learned of Respondent and her renewal rights about 10 years before this case was filed and joined in the scheme to keep her ignorant of those rights. Berlin had relinquished her claims to the Williams, Sr. estate in exchange for $30,000 in 1953. In 1969, Berlin assigned whatever contingent interest she might have to Hill & Range Songs, Inc., a predecessor of Petitioner Aberbach. Hill & Range then filed an action seeking a declaration that (through Berlin) it was entitled to a 50% interest in the renewals. Hill & Range Songs, Inc. v. Fred Rose Music, Inc., 403 F.Supp. 420 (M.D. Tenn. 1975), aff'd, 570 F.2d 554 (6th Cir. 1978).

Respondent's existence and the contents of the 1952 custody/support agreement were disclosed as part of Stewart's 1973 deposition in that case.

It was agreed that, because it was not in the best interests of either party to make the agreement part of a public court record, the document would not be made an exhibit or disclosed further.

After trial in 1975, the District Court held that Berlin owned the widow's share of the renewals. Hill & Range Songs, Inc., supra, 403 F.Supp. at 436. As a result of this decision, Williams, Jr. and the Acuff/Rose Petitioners were required to share the renewal copyright revenue with Berlin and the Aberbach Respondents regardless of any agreements they previously had entered into believing that they alone owned those rights. In 1976, Congress enacted the 1976 Copyright Act, 17 U.S.C. §101, et seq., which in §101, specifically includes illegitimates within the definition of children for

purposes of renewal copyrights. Even after these two events, Petitioners took no steps to determine or acquire Respondent's renewal rights and continued to conduct their respective businesses fully aware of those rights.

B. History Of The Case.

Respondent filed this action on September 12, 1985. In March 1987, Petitioners filed a joint motion for summary judgment on the ground that, as a matter of law under De Sylva v. Ballentine, 351 U.S. 570 (1956), Respondent is not Williams, Sr.'s child for purposes of renewal copyrights under either 1909 Act, §24 or 1976 Act, §304(a). In addition, Petitioners argued the action was barred by res judicata, collateral estoppel, the 1976 Act statute of limitations, laches, estoppel and waiver.

The motions were argued on August 6, 1987 and taken under submission. Thirteen months later the District Court granted Petitioners' joint motion on the sole ground that Respondent had been guilty of laches. The District Court held as a matter of law that she had unreasonably delayed pursuing her claim between 1974 and 1981, and on the basis of conclusory affidavits, that Petitioners would be prejudiced if the case was allowed to proceed (App. C at C-1.16-1.18).

Respondent appealed to the Court of Appeals for the Second Circuit. On April 21, 1989 that Court affirmed the District Court ("the Earlier Decision"). The Court of Appeals held that Respondent's failure to file an action between 1974 and 1980 "may well have been entirely excusable" (App. B at B-1.9-

1.10), but that her delay between 1981 and September 1985 was without plausible explanation (Id.). Based upon the conclusory affidavits filed in the District Court, the Court of Appeals also held that Petitioners would be prejudiced because of the death or faded recollection of certain witnesses and because Petitioners had entered into transactions in reliance on Respondent's failure to assert her claim during that time (App. B at B-1.11-1.13). Respondent's petition for rehearing was denied on May 23, 1989.

In its July 5, 1989 decision (see pp. 16-18 infra), the Alabama Supreme Court reviewed the evidence which Respondent had cited to the Second Circuit and concluded that Respondent's claims in that forum were not barred by laches (App. H at H-1.36-1.39). To enable the

Court of Appeals to reconsider its conclusion as to prejudice in view of the Alabama Court's recitation of the facts if it so chose, Respondent moved the Court of Appeals to recall its mandate and grant her leave to file a second petition for rehearing.

Pursuant to former Rule 20.4 of this Court, Respondent's Petition for Writ of Certiorari was due on August 21, 1989 absent an order extending time under former Rule 20.6. Recognizing that such applications "are not favored" and not being able to predict how and when the Court of Appeals would rule on her motion, Respondent timely filed her Petition for Writ of Certiorari and advised this Court of the pending motion in the Court of Appeals (App. F at F-1.22, n. 10).

The Court of Appeals granted Respondent's motions on August 24, 1989 (App.

E at E-5.1). Respondent filed her Petition for Rehearing and Suggestion for Rehearing In Banc on September 7, 1989, (App. E at E-6.1), and Petitioners herein filed three separate opposition briefs (totaling 35 pages, excluding appendices) on September 14, 1989. The matter then stood submitted without oral argument pursuant to Rule 40(a), F.R.App.P.

In this Court, Petitioners' Brief in Opposition to Respondent's Petition for Certiorari was timely filed. Because the Court of Appeals had not yet ruled on her Petition for Rehearing, Respondent moved this Court to defer consideration of her Petition (App. F-2). That motion and the Petition were denied on November 6, 1989 (App. F-3).

C. The Alabama Supreme Court Opinion.

While Respondent was prosecuting this action, litigation over her status

as an heir of Williams, Sr., her rights to the copyrights, and the validity of the 1967 and 1968 orders was proceeding in Alabama as well. Petitioners Williams, Jr., Acuff and Rose filed that lawsuit soon after they received Respondent's August 5, 1985 notice of claim to the renewals. Respondent filed a third party complaint in that litigation against Irene Smith, Stewart's estate (later dismissed), and Stewart's now dissolved law firm, Jones, Murray and Stewart, P.C. Respondent alleged that the Williams, Sr. estate should be re-opened because the 1967 and 1968 orders had been obtained through legal fraud committed by those third party defendants and other, fictitiously-named defendants.[6]

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6 The complaint and counterclaim in that litigation also sought a judicial declaration as to the validity of those orders (App. H at H-1.2-1.3).

The trial court entered summary judgment against Respondent on this issue. On July 5, 1989, the Alabama Supreme Court reversed that ruling. It held that legal fraud had been committed in the 1967 and 1968 proceedings in that (1) Smith, Stewart and others had concealed the circumstances surrounding Respondent's birth and subsequent correspondence regarding her potential rights, (2) had concealed the fact that Williams, Sr., Mrs. Stone and Smith all had acknowledged that Respondent was Williams, Sr.'s daughter, and (3) that Stewart, Smith and others, including Petitioners Williams, Jr. and Rose, had affirmatively prevented Respondent from learning of and asserting her rights to the estate and the renewal copyrights.

The Court set aside the 1967 and 1968 judgments in part, and held that Respondent "is entitled to receive her proportionate share of any proceeds of the estate of her natural father, Hank Williams, including any income or interest, and of any copyright royalties, but prospectively only from the date she gave notice of her claim, August 5, 1985." (App. H at H-1.55).

Petitioner Williams, Jr. filed a Petition for Leave to Appear in the Alabama appeal and requested that the Supreme Court vacate and modify its opinion (App. H at H-2.1). On November 9, 1989, the Court filed its Opinion on Rehearing (App. H-2). That Court "considered very closely" Williams, Jr.'s arguments (App. H-2 at H-2.12), but held that Respondent was not prevented from successfully appealing one

of the rulings which held that the estate should not be reopened by her failure to appeal a second ruling entered the same day embodying the same holding (App. H-2 at H-2.10).

D. The Second Circuit Opinion On Rehearing.

After the November 9, 1989 Opinion on Rehearing was handed down, Respondent sought leave to file a supplemental brief with the Second Circuit to advise that Court of that Opinion and its significance. That motion was granted over Petitioners' opposition. On December 5, 1989, the Court of Appeals filed its Opinion on Petition for Rehearing ("the Instant Decision") (App. A). The Court discussed the evidence reviewed in the Alabama Supreme Court's Opinion, all of which was part of the record on appeal to the Second Circuit. The Court of

Appeals noted that it was not bound by the Alabama decision (App. A at A-1.8). Nevertheless, the Court concluded that a reappraisal of its earlier conclusion on laches was necessary given the opposite conclusion the Alabama Court had reached based on the identical evidence.

With admirable judicial honesty, the Second Circuit concluded that the Earlier Decision had been wrongly decided. It held that, given Petitioners' pre-existing knowledge of Respondent and her potential claims and the legal fraud committed in connection with the 1967-1968 Alabama proceedings, Petitioners "should not now be allowed to claim that they are prejudiced by [Respondent's] present assertion of her rights when they were aware of them all along." (App. A at A-1.9) [emphasis added].

The Second Circuit's change of mind with respect to laches was not based on the Alabama Court's decision to reopen the Williams, Sr. estate, but rather on the facts recited in the opinion which led to that decision. The two cases are not "inextricably related" (Petn. at 1) and this Petition should be considered on its own.

V. SUMMARY OF ARGUMENT

The Court of Appeals accurately described the uniqueness of this case when it stated that the litigation "is a contest, after all, between Hank Williams' heirs over copyright renewal rights." (App. A at A-1.9). The Alabama Supreme Court also noted "the unique character" of the litigation in that forum, (App. H at H-1.54), and took its "peculiar circumstances into consideration" when it fashioned the relief

awarded in that case (Id.).

In their Brief in Opposition to Respondent's Petition for Writ of Certiorari in No. 89-295, Petitioners characterized this case as nothing more than an "academic or episodic" problem not deserving of this Court's consideration, citing Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955). They argued that the Court of Appeals had applied the laches doctrine correctly to a peculiar set of facts which was not likely to repeat itself, and that the case did not present any special and important reasons for granting the requested writ.

This case is no less unique, presents no less an academic or episodic problem, and is no more entitled to review by this Court now that the Court of Appeals has "reassess[ed] the equita-

ble circumstances peculiar to this case", changed its mind, and held "the equities fall on [Respondent's] side." (App. A at A-1.9). The Court of Appeals did not depart from the accepted and usual course of proceedings when it re-evaluated the Earlier Decision. That Court exercised its inherent power to recall its mandate, received and considered extensive briefs on rehearing filed by all parties, and reassessed its prior conclusion regarding Petitioners' claimed prejudice.

That it is rare for a Court of Appeals to recall its mandate and then vacate an earlier decision does not make such action worthy of this Court's review. The exacting standards applicable to motions to recall and petitions for rehearing provide more than sufficient safeguards against successive

and/or untimely rehearings.

Petitioners' supposition that the Court of Appeals applied a new, unarticulated standard of review because the Instant Decision does not repeat that portion of the Earlier Decision is just that - supposition. A supposedly unarticulated standard of review does not supply the clear and unambiguous statement of law which must be compared to decisions of this Court or other courts of appeal to determine whether a direct and specific conflict on an issue of national significance exists.

VI. ARGUMENT

A. The Court of Appeals Possessed The Inherent Power To Recall Its Mandate And Grant The Second Petition For Rehearing.

To state the truism that neither statutes nor the Federal Rules of Appellate Procedure authorizes successive

petitions for rehearing begs the question of whether the Court of Appeals acted properly in this case. It is a well established and uniform rule throughout the country that courts of appeals have the inherent power to recall their mandates. See eg., Zipfel v. Halliburton Co., 861 F.2d 565, 567 (9th Cir. 1988); Coleman v. Turpin, 827 F.2d 667, 671 (10th Cir. 1987); A to Z Portion Meats, Inc. v. N.L.R.B., 643 F.2d 390, 392, n.1 (6th Cir. 1980); Dilley v. Alexander, 627 F.2d 407, 410-11 (D.C. Cir. 1980); American Iron & Steel Institute v. E.P.A., 560 F.2d 589, 592-94 (3rd Cir. 1977), cert. denied, 435 U.S. 914 (1978); Braniff Airways, Inc. v. Curtiss-Wright Corp., 424 F.2d 427, 429 (2d Cir.), cert. denied sub. nom, Addabbo v. Curtiss-Wright Corp., 400 U.S. 829 (1970), Gradksy v. United

States, 376 F.2d 993, 995 (5th Cir.), cert. denied sub. nom, Grene v. United States, 389 U.S. 908, reh'g. denied, 389 U.S. 998 (1967).

It is equally well-established and uniformly the rule that courts of appeal exercise this power only in exceptional circumstances. See e.g., Johnson v. Bechtel Associates Professional Corp., 801 F.2d 412, 416 (D.C. Cir. 1986); Fine v. Bellafonte Underwriters Ins. Co., 758 F.2d 50, 58 (2d Cir. 1985); Greater Boston Television Corp. v. F.C.C., 463 F.2d 268, 278 (D.C. Cir. 1971), cert. denied, 406 U.S. 950 (1972).

One such circumstance is to prevent an injustice. Coleman v. Turpin, supra, 827 F.2d at 671; Greater Boston Television Corp. v. FCC, supra 463 F.2d at 278-79. Another is to avoid conflicting results. Id. Recall also is proper

where there is a subsequent change in the applicable law or subsequent discovery of facts which materially affects the earlier decision. Braniff Airways, Inc. v. Curtiss-Wright Corp., supra, 424 F.2d at 427 [change in law]; Coleman v. Turpin, supra, 827 F.2d at 671 [discovery of facts].

Whether to grant a motion to recall and/or entertain a second petition for rehearing is properly vested in the discretion of the court of appeals, to be exercised on a case by case basis under the particular facts presented. Zipfel v. Halliburton Co., supra, 861 F.2d at 567; American Iron and Steel Institute v. E.P.A., supra, 560 F.2d at 594-95. The infrequency with which such motions are granted demonstrates that the standards established in these decisions operate fairly and effectively to pro-

mote finality of litigation while allowing for the exceptional case when the interests of justice outweigh that policy. There is no need for this Court to provide guidance in this area.

B. The Submission And Subsequent Denial Of Respondent's Petition For Certiorari Did Not Affect The Court Of Appeals' Power To Recall Its Mandate.

It is not necessary for this Court to determine the effect the pendency of a petition for certiorari has on a court of appeals' jurisdiction to recall its mandate and/or entertain a second petition for rehearing because there is no difference of opinion on that question. The mere filing of a petition has no effect on the lower court's power to recall its mandate. Braniff Airways, Inc. v. Curtiss-Wright Corp., supra, 424 F.2d at 429-30; Glick v. Ballentine Produce, Inc., 397 F.2d 590, 594 (8th

Cir. 1968), United States v. Eisner, 323 F.2d 38, 42 (8th Cir. 1963); Kinnear-Weed Corp. v. Humble Oil & Ref. Co., 296 F.2d 215 (5th Cir.), cert. denied, 368 U.S. 890, reh'g denied, 368 U.S. 936 (1961).

That this is the rule necessarily follows from the nature of this Court's certiorari jurisdiction. As clearly stated in Supreme Court Rule 10.1: "A review on writ of certiorari is not a matter of right, but of judicial discretion [and] will be granted only when there are special and important reasons therefor." A petition for certiorari is simply a request that this Court exercise its jurisdiction over a case. The lower court is not deprived of its jurisdiction unless and until the request is granted. Glick v. Ballentine Produce, Inc., supra, [filing of

petition does not prevent judgment from becoming final]; Kinnear-Weed Corp. v. Humble Oil & Ref. Co., supra.

Petitioners' reliance on Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982) is misplaced. In Griggs, this Court considered the effect a motion for new trial filed in the District Court had on a notice of appeal filed under Rule 4(a), F.R.App.P. This Court held that according to the plain language of Rule 4(a)(4), a previously-filed notice of appeal was without effect. 459 U.S. at 61. The Rule so provides because, unlike this Court's certiorari jurisdiction, a court of appeals' jurisdiction is mandatory and the timely filing of a notice of appeal divests the District Court of its jurisdiction. Id. at 58. There is no such automatic divestment when a petition for

certiorari is filed.[7]

The denial of a petition for certiorari is equally without effect on the court of appeals' power to recall its mandate and/or entertain a petition for rehearing. Such an order merely signifies that less than four members of this Court believe the required special and important reasons for granting the writ exist in the particular case. Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 917-19 (1950)(Frankfurter, J., dissenting).

Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321 (6th Cir.), cert. denied, 389 U.S. 975 (1962)

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7 Petitioners' reliance on F.C.C. v. League of Women Voters, 468 U.S. 364 (1984) is similarly misplaced. In that case, this Court held that Griggs did not apply because F.C.C. was a direct appeal pursuant to 28 U.S.C. §1252 and Rule 4(a)(4) was not applicable. 468 U.S. at 373, n.10. The effect of a petition for certiorari was not even discussed.

and Seese v. Volkswagenwerk, A.G., 679 F.2d 336 (3rd Cir. 1982) are not in conflict with the Instant Decision. Neither case involved a motion to recall the mandate and/or a second petition for rehearing after certiorari had been denied. Therefore, the observation in Deane Hill Country Club that "the denial of certiorari merely specifies that appellate review has been exhausted," 379 F.2d at 326, is not a holding that a court of appeals lacks the power to do what the Court of Appeals did in the Instant Decision. The holding in Seese, that a district court lacks jurisdiction to alter a court of appeals' mandate by way of a motion under Rule 60(b)(6), F.R.Civ.P., does not conflict with the Instant Decision because in this case, the Court of Appeals recalled its own mandate.

C. The Court Of Appeals Correctly Applied The Appropriate Standard of Review.

Petitioners argue that in rendering the Instant Decision, the Court of Appeals did not apply the applicable abuse of discretion standard of review and did not defer to the District Court's supposed findings of fact, as required by Rule 52(a), F.R.Civ.P. This argument does not support a grant of certiorari because it (1) presumes the Court of Appeals applied an improper standard of review when there is no indication in the opinion that such is the case; (2) incorrectly assumes the District Court properly could engage in fact-finding when ruling on the summary judgment motion when in fact it could not have done so under Rule 56, F.R.Civ.P.; and (3) does not demonstrate that the Instant Decision will have any

precedential effect or create any uncertainty in the law given the extraordinary and unique factual background and procedural history of the case. It is not the function of this Court to review lower court decisions which have no impact beyond the particular litigants and do not present legal issues which are likely to arise in the future.

There is no basis for Petitioners' assumption that the Court of Appeals jettisoned the abuse of discretion standard of review applied in the Earlier Decision because that part of the previous opinion is not repeated in the Instant Decision. There was no need for the Court of Appeals to lengthen the Instant Decision unnecessarily by repeating principles of law which were not germane to the issue presented on rehearing. It must be assumed the Court

of Appeals applied the proper standard of review absent compelling evidence to the contrary. Such evidence is not present here. Petitioners would have this Court (1) assume a different standard of review was applied; (2) guess what that standard of review was; and then (3) grant certiorari to determine whether that hypothetical standard of review was proper.

Petitioners next argue that, in violation of the proper role of an appellate court and the clearly erroneous standard of review, the Court of Appeals substituted its own factual determinations for findings of fact supposedly made by the District Court. Astonishingly, Petitioners contend the District Court properly could make factual determinations in ruling on the laches defense even though it had been

presented by way of a motion for summary judgment.

This Court has made it very clear that "judicial fact-finding" (Petn. at 15) is not permitted under Rule 56, F.R.Civ.P. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). A court's function is to determine whether a genuine issue of material fact exists. If one does, the motion must be denied. Petitioners do not cite a single decision from this Court or any court of appeals which creates an exception from this rule for summary judgment motions raising the defense of laches.

The evidence of Petitioners' pre-existing knowledge of Respondent and her rights was undisputed, as Petitioners concede (Petn. at 18-19). Whether they could establish cognizable prejudice if the case were allowed to proceed was

thus an issue of law. Cf. E.E.O.C. v. Great Atlantic & Pacific Tea Co., 735 F.2d 69, 81 (3rd Cir. 1983), cert. dismissed 469 U.S. 925 (1984)[whether delay "inexcusable" is conclusion of law]. Where a district court awards summary judgment based upon an erroneous application of law to the undisputed facts, reversal is required. Howes v. Medical Components, Inc., 814 F.2d 638, 643 (Fed. Cir. 1987). The standard of review in such cases is de novo. S.E.C. v. Belmont, Reid & Co., 794 F.2d 1388, 1390 (9th Cir. 1986). Furthermore, a district court abuses its discretion when, inter alia, it commits legal error. Petition of Hill, 775 F.2d 1037, 1040 (9th Cir. 1985); Christian Schmidt Brewing Co. v. G. Heileman Brewing Co. Inc., 753 F.2d 1354, 1356 (6th Cir.), cert. dismissed, 469 U.S. 1200 (1985);

Commonwealth Life Ins. Co. v. Neal, 669 F.2d 300, 303-4 (5th Cir. 1982).

In concluding that the District Court erred in finding Petitioners would be prejudiced notwithstanding their prior knowledge and ability to obtain a declaration of rights at any time after 1974, the Court of Appeals simply held that the trial court had committed legal error in granting summary judgment. That the Court of Appeals believed it was necessary to reconsider its earlier conclusion regarding prejudice because of the Alabama opinion does not mean it used a different standard, went outside the record, or departed from the usual course of proceedings in any other way.

D. The Instant Decision Is Based On Undisputed Facts In The Record On Appeal.

Petitioners incorrectly state that the Court of Appeals went outside the

record on appeal in rendering the Instant Decision. They concede that all the evidence recited in the Instant Decision was part of the District Court record (Petn. at 18). Pursuant to Rule 10(a), F.R.App.P., the "original papers and exhibits filed in the district court . . . constitutes the record on appeal in all cases." Thus, the undisputed evidence, including the three letters which established Petitioners' prior knowledge of Respondent and her potential claims, was part of the record on appeal.

Petitioners confuse the record on appeal with the Appendix prepared pursuant to Rule 30, F.R.App.P. The latter is not the record on appeal, it is only that portion of the record "to which the parties wish to direct the particular attention of the court." Rule 30(a),

F.R.App.P. Respondent was not required to include in the Appendix all the evidence she submitted to the District Court in order to refer to that evidence in her briefs and have it considered by the Court of Appeals: "The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts." Rule 30(a), F.R.App.P. See also, Billings v. Chicago, R.I.& P. RR. Co., 570 F.2d 235, 238 (8th Cir. 1978).

Petitioners concede, (Petn. at 19), that Respondent referred to the evidence mentioned in the Alabama Supreme Court's decision in her briefs to the Court of Appeals. The Court of Appeals quite properly relied on that evidence in rendering the Instant Decision and did not base its decision on "'facts' from outside its own judicial system." (Id. at

18). That the Court of Appeals did not include record references to evidence all parties were aware of does not prove otherwise.

Petitioners' assertion that the Instant Decision resulted from the Court of Appeal's conclusion that they had withheld this evidence from the District Court is based upon a misreading of the opinion. The concealment the Court of Appeals focused on was Petitioners' concealment of the relevant facts from Respondent:

> "The prejudice to [Petitioners] we identified in our prior opinion . . . would not have existed but for the failure of the [Petitioners] to reveal the facts of which they had knowledge. [Petitioners] could have sought a court declaration of their rights vis-a-vis [Respondent]. Instead they chose to remain silent. They should not now be allowed to claim that they are prejudiced by [Respondent's] present assertion of her rights when they were aware of them all along." (App. A at A-1.9).

This holding and the Court of Appeal's earlier statement that "recited evidence in the Alabama court makes clear that [Petitioners] were aware of [Respondent's] rights to the copyright renewals long before [Respondent]" (Id. at A-1.8), demonstrate that the Court of Appeals concluded that Petitioners could not establish the required prejudice because of their pre-existing knowledge of Petitioner and her rights, not because they supposedly withheld evidence from the District Court.

If in fact the Instant Decision resulted from such a misapprehension, Petitioners' remedy was a petition for rehearing under Rule 40, F.R.App.P. Respondent utilized that procedure to advise the Court of Appeals of the errors in the Earlier Decision (App. E-2). Petitioners did not invoke that

remedy and are now requesting this Court to review the voluminous record on appeal to determine whether the Instant Decision contains factual errors. That is not a proper basis for review in this Court.

VII. CONCLUSION

To borrow from Petitioners' Opposition Brief in No. 89-295 (at p.22): "The questions presented for review . . . are not special or important to anyone other than the parties to this action in any manner other than natural academic curiosity and speculation."

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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